BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
	)	WC Docket No. 07-245
Implementation of Section 224 of the Act;	)	
Amendment of the Commission's Rules and	)	RM-11293
Policies Governing Pole Attachments	)	
	)	RM-11303
	)	
	)	

COMMENTS OF TIME WARNER TELECOM INC. ONE COMMUNICATIONS CORP. AND COMPTEL

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Time Warner Telecom Inc. ("TWTC"), One Communications Corp. ("One"), and COMPTEL, by their attorneys, hereby file these comments in response to the FCC's notice of proposed rulemaking in the above-referenced docket.[1]

I. INTRODUCTION AND SUMMARY

Poles, ducts and conduits are an essential part of the modern information-age infrastructure. Utility poles in particular are often the only, and almost always the most efficient, way for wireline carriers to traverse public and private rights-of-way. Congress has long recognized that pole owners have powerful incentives to abuse their control over essential pole facilities by unilaterally increasing pole attachment prices and by denying, delaying and degrading access. This is an especially serious concern where, as is often the case, pole owners compete with attachers in downstream retail markets for broadband

[1] *See Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 21 FCC Rcd 20195 (2007) ("*NPRM*").

internet access and other services. Congress has therefore granted the FCC powerful regulatory tools in Section 224 of the Communications Act for limiting pole owners' ability to act on their incentives to increase prices and degrade the quality of pole access.

Unfortunately, the FCC's current regime for implementing its broad powers under Section 224 is ill-suited to the current marketplace. Unlike the market when the FCC adopted its current rules, cable companies, telecommunications carriers and even power companies are beginning to compete with one another in the same downstream retail markets, particularly the market for broadband internet access service. Current pole attachment rules place non-pole owning telecommunications carriers at a substantial disadvantage in this competition. This is because the current rules allow pole owners to charge telecommunications carriers pole attachment rates that are two-to-three times higher than the rates that pole owners charge cable operators. This is true even though the telecommunications carriers' attachments do not generally impose more costs than cable attachments. Indeed, where a telecommunications carrier leases fiber from a cable operator, the rates for the pole attachments supporting the fiber increase two-to-three times to the telecommunications rate *even though the same cable is being used and the pole owner is completely unaffected by this change in usage*.

But the flaws in the current regime extend beyond pole attachment rates. As Fibertech explained in its petition for rulemaking and as TWTC has explained in filings in the Fibertech rulemaking petition docket, pole owners engage in myriad unjust, unreasonable, and discriminatory tactics against attachers. Moreover, as TWTC and One have found, the problems persist today. These include (1) the refusal to box poles or provide extension arms in those situations where such arrangements do not cause safety

concerns; (2) failure to perform necessary make-ready work for many months while prohibiting attachers or their approved agents from performing such work at their own expense; (3) taking many months to complete preliminary survey and engineering work before make-ready work can even commence; and (4) charging new attachers to correct errors and safety issues caused by prior attachers. This kind of unreasonable conduct stunts the deployment of broadband internet access, thus subverting the policy goals of Section 706. Moreover, where the pole owner itself competes in downstream retail markets with attachers, such conduct places attachers at a substantial competitive disadvantage vis a vis pole owners.

It is therefore abundantly clear that the Commission must promptly address the obvious flaws in its current pole attachment regime. In so doing, it can look to states that have exercised their right of reverse preemption over pole attachments in Section 224 for helpful guidance. *First*, the FCC should follow the majority of states and adopt rules implementing the tentative conclusion in the *NPRM* that a single pole attachment rate should apply to all service providers that compete in the market for broadband internet access service. As TWTC explained in detail in its White Paper, Section 224 grants the FCC clear authority to eliminate the discrimination in the current regime, either by relying on the "nondiscrimination" mandate of Section 224(e) or by exercising its discretion to adjust current rate formulas to reduce or eliminate unreasonable differences in rates.[2] Moreover, the rate should be equal to the rate currently paid by cable companies that do not provide a telecommunications service (i.e., the "cable rate"). The

[2] *See* Letter from Thomas Jones, Counsel for Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, RM-11293, RM-11303, Attach. at 11-12 (filed Jan. 16, 2007) ("TWTC White Paper")

cable rate provides full compensation to pole owners, will stimulate deployment of broadband, and is within the power of the FCC to implement (indeed it has already been upheld on appeal in *Alabama Power Company v. FCC*, 311 F.3d 1357 (11th Cir. 2002)).

A unified rate would bring the FCC in line with the vast majority of states that have adopted rate formulas for pole attachments subject to their jurisdiction. States that have generally found that a uniform rate formula reduces the potential for costly litigation regarding which rate to apply. Importantly, state commissions have generally mandated that pole owners follow the cable rate formula, because it most appropriately allocates the costs between the pole owners and attachers and provides full compensation to the pole owners.

Second, the FCC also must address non-price issues by adopting more detailed performance rules for pole, duct and conduit owners. Adoption of national rules governing pole owners' performance is both sound policy and within the FCC's jurisdiction to regulate the "terms and conditions" of pole attachments. Despite the fact that many of the unjust and unreasonable practices at issue have been deemed unlawful in FCC pole attachment adjudications, pole owners have not stopped engaging in them. As a result, attachers must return again and again to contest these same activities as if prior adjudicatory decisions had never been released. Rules of general applicability should reduce levels of recalcitrance by providing additional clarity and diminishing the extent to which utilities can raise rivals' costs through needless litigation.

As is the case with rate regulation, the states offer helpful guidance in the area of non-price regulation, since states have adopted many of the rules proposed by Fibertech and other competitors like TWTC and One. These include establishment of a 30 day

period from the pole owner's receipt of payment by the attacher for the completion of make-ready work, permitting the use of third party contractors to perform such work and permitting the boxing of poles and installation of extension arms in those instances where safety conditions permit. The FCC should follow these states and adopt similar rules to ensure that attachers and pole owners can compete on a level playing field.

II. THE COMMISSION SHOULD APPLY THE CURRENT CABLE RATE FORMULA TO ALL ATTACHMENTS USED TO PROVIDE BROADBAND INTERNET ACCESS SERVICES

In deploying fiber facilities needed to provide broadband internet access and other services, competitive carriers often have no choice but to rely on pole attachments. Utility poles are often the only available means by which competitors can traverse public rights-of-way, because alternative means such as underground ducts are simply unavailable due to geological conditions, state or local prohibitions on digging the necessary tunnels, and other factors. Even where alternatives to utility poles are available, pole access is usually the most efficient means of traversing public and private rights of way, assuming that such access can be obtained on reasonable rates, terms and conditions.

It is for this reason that the rate charged by pole owners for access is of central importance to the continued development of facilities-based competition. Unfortunately, as TWTC explained in its White Paper, the current differential in the rates yielded by the cable attachment and telecommunications carrier attachment rate formulas harms competition by skewing efficient outcomes. This is because the current rules result in attachment rates that are two-to-three times higher for telecommunications carriers than for cable companies. In addition, high pole attachment rates for telecommunications carriers can create even more acute distortions where such carriers compete with utility

pole owners in the provision of downstream retail broadband internet access service. For example, where a power company provides broadband over power line service (which is classified as an information service[3]), but neither a telecommunications service nor a cable service, the power company is not subject to the imputation requirement in Section 224(g). In competing with telecommunications carriers in the provision of broadband internet access, therefore, the power company's pole-related costs would be zero, whereas a telecommunications carrier's costs could be as high as $20 or $30 per pole in addition to make-ready, inspection and other charges imposed by pole owners.

As TWTC explained, the Commission has full authority to eliminate or substantially reduce the problems caused by the current regime. Most importantly, the Commission has the authority to eliminate or reduce the differential between telecommunications carrier and cable system attachments pursuant to its obligation to ensure that pole attachments for telecommunications carriers under Section 224(e)(1) are "nondiscriminatory" or pursuant to its authority to adjust the inputs in its rate formulas.[4] As the Commission suggests in the *NPRM*, the appropriate exercise of this authority is to ensure that all attachments used to provide broadband internet access are subject to a single, unified rate. *NPRM* ¶ 36. Moreover, as TWTC has explained, all competitors should pay the rate yielded by the cable formula. This is the appropriate rate because the FCC and the courts have deemed it to be just and reasonable. In addition, because it yields rates that are closer to pole owners' costs, the cable formula diminishes the harms

[3] *See in the Matter of United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006).

[4] *See id.* at 13-22 (discussing how Section 224(e) of the Communications Act provides sufficient authority to reassess the rates).

caused by the absence of an imputation requirement for utilities that use their poles to provide broadband over power lines.

There are many other subsidiary arguments in support of this outcome set forth in the White Paper, but TWTC, One, and COMPTEL will not repeat those here. Instead, set forth below is a discussion of the manner in which states have implemented unified rates. Importantly, unlike the Commission's proposal in the *NPRM*, the states generally have achieved this outcome by applying the cable rate formula to all attachers.

Nineteen states and the District of Columbia have chosen to preempt the Commission's regulation of pole attachments.[5] Where there is a clear trend among states' approach to the regulation of poles, the states' decisions provide an important roadmap for the Commission in its current rulemaking, particularly given Congress' recognition of state regulators' comparative advantage in regulating poles.[6]

Perhaps the most important trend among the states that have exercised reverse preemption over pole attachment regulation is that a majority has adopted a single rate formula for attachments by both cable operators and telecommunications carriers. Specifically, of the 13 states that have exercised their reverse preemption right and

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[5] *See States that have Certified that They Regulate Pole Attachments*, Public Notice DA 92-201 (rel. Feb. 21, 1992), *available at* http://www.fcc.gov/eb/mdrd/pacert.html; *New Hampshire Joins States that have Certified that They Regulate Pole Attachments*, Public Notice DA 08-450 (rel. Feb. 22, 2008).

[6] In drafting the reverse preemption right for the states, Congress stated that it found the matter of pole attachments to be "essentially local in nature," noting that regulation should be vested with "those persons or agencies most familiar with the local environment." *See* S. Rep. No. 95-580 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 124. Specifically, with regard to ratesetting for pole attachments, Congress stated that such regulation should be based on "[c]onsiderations of equity [that] turn on the needs and interests of local constituents," noting that local regulatory bodies were better attuned to these needs. *Id.* at 126.

prescribed specific rate formulas, fully 11 have adopted a uniform rate[7] and only two have adopted and maintained separate rate formulas for cable versus telecommunications attachments (the other six states and D.C. have not adopted specific rate formulas). Moreover, of the two states that have opted for separate formulas, Ohio has expressly based its decision on following FCC precedent,[8] and New Hampshire has merely adopted two formulas on an interim basis while it conducts its rulemaking on pole attachment rates.[9] Neither state based its two-rate determination on grounds of public policy; indeed, there is no sound policy reason for adopting separate rates. In contrast, the states that have opted for a single rate have offered powerful support for this approach. In addition, most of the states that have adopted a single rate have done so by establishing a rate formula that is either identical to or similar to the federal cable rate formula.

States that have adopted a single rate formula have generally concluded that this approach reduces the confusion and potential for litigation regarding which rate to apply. For example, the California Public Service Commission stated that the application of a uniform rate formula to all attachments would "avoid potential disputes over whether our

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[7] *See, e.g.*, Alaska Admin. Code tit. 3, § 52.900 *et seq.*; Cal. Pub. Util. Code § 767.5; Del. PSC Pole Attachment Regulation § 7.2.; Ill. Admin. Code tit. 83, § 315.20; 65-407 Me. Code R. § 65-407; N.J. Admin. Code § 14:18-2.9. *See Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Companies, et al.*, Case 01-E-0026, Order Granting in Part Petitions for Rehearing and/or Clarification, (N.Y. PSC July 16, 2002), Or. Admin. R. § 860-028-0110(2), Utah Admin. Code § 746-345-5, Vt. Code R. § 3.706(D)(1).

[8] *See Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD, Order and Opinion (Ohio PUC Aug. 22, 2007).

[9] *See* Letter from Thomas B. Getz, Chairman, New Hampshire Public Utilities Commission, to Marlene H. Dortch, Secretary, Federal Communications Commission dated Jan. 23, 2008.

adopted rules apply to a particular service offered over an attachment used to provide multiple services. By applying our rules in this manner, we seek to minimize potential litigation which may threaten to impede the growth of the local exchange competitive infrastructure."[10] New York and Oregon reached essentially the same conclusion.[11]

States have also found that a single rate avoids unreasonable rate discrimination. For example, Kentucky's Public Service Commission found pole attachments provided to a telecommunications carrier is "a like service made under the same or substantially the same conditions"[12] as attachments provided to a cable system. Accordingly, the Commission concluded that it would constitute "a violation of KRS 278.170(1) [Kentucky's non-discrimination statute] for the parties to charge each other attachment rates based on a different methodology than that it uses to calculate the rate they charge their cable customers." *Ky. Order* at 7. Similarly, California's Public Service Commission applied the same pole attachment rate formula in order to ensure that all CLECs, including those that were not affiliated or owned by a cable corporation, were

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[10] *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, et al.*, Docket No. R.95-04-043, Decision No. 98-10-058, at 24 (Cal. PUC Oct. 22, 1998) ("*Cal. Pole Attachment Order*").

[11] *See Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Companies, et al.*, Case 01-E-0026, Order Granting in Part Petitions for Rehearing and/or Clarification (N.Y. PSC July 16, 2002); *Rulemaking to Amend and Adopt Rules in OAR 860*, Docket Nos. AR 506, AR 510, Order No. 07-137, at 8 (Or. PUC Apr. 10, 2007) ("*Or. Order*") (citing *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002)).

[12] *Ballard Rural Telephone Cooperative Corporation, Inc v. Jackson Purchase Energy Corporation*, Case No. 2004-00036, Order, at 3 (Ky. PSC Aug. 2, 2007) ("*Ky. Order*"). KRS 278.170(1) prohibits a utility from giving any "unreasonable preference or advantage" or making any "unreasonable difference" as to rates among customers who received a "like and contemporaneous service under the same or substantially the same conditions."

assured access to poles "under nondiscriminatory rates, terms, and conditions."[13] These conclusions are especially relevant to the instant proceeding in which the FCC is considering whether it should mandate a uniform rate for pole attachments to ensure compliance with the nondiscrimination mandate in Section 224(e).

The states have also concluded that a single rate *based on the cable rate formula* appropriately allocates the benefit of attachments provided to telecommunications carriers and cable systems. Like Section 224(c) and (e) (the two rate provisions at issue in this proceeding), state laws authorizing state regulation of pole attachment rates generally require that pole attachment rates be "just and reasonable."[14] To achieve this outcome, state commissions have generally mandated that pole owners follow the cable rate formula, because it most appropriately allocates the costs between the pole owners and attachers. Michigan's regulatory commission stated the principle most clearly: "The Commission finds that [the cable formula] is a more reasonable approach to allocation than those proposed by the utilities because it achieves a better approximation of the benefit that each user of a pole receives relative to the other users."[15] The Regulatory Commission of Alaska similarly held that, "We are not convinced from the record that alternative formulas before us are any more accurate and reasonable than the existing CATV formula."[16] Oregon's PUC also provided explicit comment on the fairness of the

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[13] *Cal. Pole Attachment Order* at 54-55.

[14] *See, e.g.*, Alaska Stat. § 42.05.381; N.Y. Pub. Serv. Law § 119-a; Ohio Rev. Code Ann. § 4905.

[15] *See Consumers Power Co., et al.,* Case No. U-10831, *et al.*, Opinion and Order, at 13 (Mich. PUC Feb. 11, 1997) ("*Mich. PUC Rate Order*").

[16] *See In the Matter of the Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted under 3 AAC 52.900 -- 3 AAC*

cable rate formula, concluding that "the cable formula has been found to fairly compensate pole owners for use of space on the pole."[17] The Oregon PUC declined to adopt the federal telecommunications rate formula, noting that the "legislature did not adopt, nor did any party argue for, the telecommunications rate, even though it was established at the federal level."[18] Although it has not adopted a specific rate formula, the Connecticut Department of Utility Control concluded that: "the record is far from clear as to whether the price differential between the cable and telecommunication attachment fee is due to any real reflection of increased costs to [the electric company] and its ratepayers. . . . [The electric company's] expert witness Kowalski testified that there is no additional cost burden."[19] Even where they have not explicitly discussed the issue in a public record, most state commissions have opted to prescribe a version of the FCC's cable rate formula pursuant to the requirement that pole attachment rates be "just and reasonable".[20]

While the states have generally adopted similar, pro-competitive approaches to pole attachments that are conducive to the deployment of broadband internet access

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52.940, Docket No. R-00-5, Order No. 4, at 6-7 (RCA, Oct. 2, 2002), codified at Alaska Admin. Code tit. 3, § 52.900 *et seq.*

[17] *Or. Order* at 8 (citing *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002)).

[18] *Id.* at 7.

[19] *See Petition of The United Illuminating Company for a Declaratory Ruling Regarding Availability of Cable Tariff Rate for Pole Attachments by Cable Systems Providing Telecommunications Services and Internet Access*, Docket No. 05-06-01, Decision, at 5 (Conn. DPUC Dec. 14, 2005).

[20] *E.g.,* Alaska Stat. § 42.05.381; Mass. Gen. Laws ch. 166 § 25A; Mich. Comp. Laws §§ 460.6(g), 484.2361; N.Y. Pub. Serv. Law § 119-a; Ohio Rev. Code Ann. § 4905.71; Or. Rev. Stat. § 757.279.

service, California and New York have established especially well-developed regulatory regimes. California's current pole attachment regime is premised on the nondiscriminatory access to rights-of-way as a means of fostering competition and deployment of services. California's pole attachment statute was enacted in 1977 to lower the barriers to the deployment of cable services.[21] However, in 1998, the California Public Service Commission extended its regime beyond cable company access to competitive telecommunications carriers, noting that it would be unwise to ignore the converging technologies. As the Commission explained,

> we must simultaneously consider the interrelationship between the local exchange and cable industries in seeking to promote a competitive infrastructure. . . . [V]arious cable corporations have in recent years have become certificated as CLCs, and now offer telecommunications services over the same connections previously used only for cable services. For the same reasons that we have determined to apply uniform pole attachment rates for both cable and telecommunications services, we conclude that the rules governing other terms and conditions of access should likewise apply uniformly.[22]

Accordingly, in order to advance its goal of equal treatment of cable and competitive telecommunications carrier attachments, the PSC extended the cable rate formula to attachments by telecommunications carriers. In so doing, it explained that, "There is generally no difference in the physical connection to the poles or conduits attributable to the particular service involved." *Id.* at 53.

Moreover, the PSC held that the cable rate did not result in a subsidy of the telecommunications or cable attacher by the utilities. It conceded that pole owners would likely see a reduction in revenues as a result of its adoption of new pole attachment rates

[21] *See* Cal. Pub. Util. Code § 767.5.

[22] *Cal. Pole Attachment Order* at 24.

for telecommunications carriers, but it found that "there is no reason to conclude that the reduced revenues constitute an unlawful taking of property." *Id.* at 56. Moreover, it concluded that the rate formula reasonably compensated pole owners for costs of the pole. *See id.* Finally, the PSC stated that the rate formula was reasonable, because it enabled the PSC to carry out its "purpose as a regulator of public utilities," *i.e.*, to protect CLECs, which were generally in a "weaker bargaining position vis-à-vis incumbent utilities," against anticompetitive pricing. *See id.*

New York's current pole attachment regulations are also borne out of the effort to ensure competition in the telecommunications and cable services market. Interestingly, New York initially adopted the FCC's dual rate formula approach in 1997 based at least in part on its view that, when they begin offering telephone service, cable companies should pay the same rate paid by incumbent LEC telecommunications carriers, a rate set based on the telecommunications carrier formula.[23] However, the New York Public Service Commission abruptly ended its experiment with the dual rate formulas in 2002.[24] It observed that telecommunications carrier pole attachments were two to three times higher than the rates paid by cable operators. *See N.Y. Order* at 4. The New York PSC held that increasing pole attachment rates would be "contrary to the public interest under PSL §119-A, in that it would undermine efforts to encourage facilities-based competition

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[23] *See In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095,* Case 95-C-0341, Opinion and Order Setting Pole Attachment Rates, Opinion No. 97-10 (N.Y. PSC June 17, 1997). New York also emphasized the importance of ensuring regulatory parity with other states. *Id.*

[24] *See Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Companies, et al.,* Case 01-E-0026, *et al.*, Order Directing Utilities to Cancel Tariffs (N.Y. PSC Jan. 15, 2002) ("*N.Y. Order*").

and to attract business to New York." *Id.* The New York PSC therefore determined that a more effective means of promoting facilities-based competition would be to adopt the cable rate as the uniform rate for all attachments.[25]

As this survey demonstrates, when considering how best to advance the objectives of establishing the preconditions for facilities-based competition in a competitively neutral manner while at the same time ensuring just, reasonable, nondiscriminatory and compensatory rates, states have done what the FCC should do here. They have required that pole owners charge all attachers a single rate based on the FCC's cable rate formula. The FCC must now follow suit.[26]

III. THE COMMISSION SHOULD ADOPT NATIONAL RULES GOVERNING THE TERMS AND CONDITIONS FOR OBTAINING AND MAINTAINING ACCESS TO POLES

Fibertech, TWTC and others have explained in-depth how pole owners delay and constrain competitors' access to poles, ducts and conduits.[27] The record in the Fibertech rulemaking petition proceeding is replete with examples of conduct by pole owners that

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[25] *See Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Companies, et al.,* Case 01-E-0026, *et al.*, Order Granting in Part Petitions for Rehearing and/or Clarification (N.Y. PSC July 16, 2002).

[26] The Commission has already determined that the appropriate rate for multiple services on the cable attachment (i.e., cable modem services) is the cable rate. *See Implementation of Section 703(e) of the Telecommunications Act of 1996,* Report and Order, 13 FCC Rcd 6777, (1998), *aff'd in part, rev'd in part, Gulf Power Co. v. FCC,* 208 F.3d 1263 (11th Cir. 2000), *rev'd & rem'd, Nat'l Cable & Telecommc'ns Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002)

[27] *See* Fibertech Petition, RM-11303; TWTC Reply Comments, RM-11303 ("TWTC Reply Comments"); Letter of Thomas Jones, Counsel, Time Warner Telecom, to Marlene H. Dortch, Secretary, FCC, RM-11303 (filed May 11, 2007) appended hereto in Appendix B ("TWTC Non-Price Remedies Letter").

delays, degrades and increases the price of pole access. For example, TWTC has argued that (1) in many cases it has been unable to utilize extension arms to take advantage of existing pole capacity even in those cases where such use does not raise safety concerns; (2) pole owners often wait months or even years after receiving an initial application to complete make-ready work, and these delays are exacerbated by the pole owners' refusal to permit a mutually agreed upon third party to perform the make ready work; (3) pole owners often wait up to a year after receiving an application before informing TWTC as to whether access to poles is available; (4) pole owners needlessly replace poles and pass on the substantial replacement cost to attachers instead of simply rearranging the attachments to create additional space on existing poles at a much lower cost; (5) pole owners incorrectly bill attachers for make ready costs incurred by previous attachers; and (6) pole owners often bill an attacher for the entire cost of correcting a safety violation which may have been caused by a prior attacher.

Unfortunately, these violations continue despite the fact that pole owners are in many instances acting contrary to past FCC pole attachment adjudicatory rulings. TWTC conducted a field survey of its employees with responsibility for obtaining pole access for purposes of preparing these comments to determine the extent to which pole access problems persist. In response to the survey, field engineers reported many of these same problems TWTC has described in previous filings, and, in addition, found that utilities (1) often prioritize their own-make ready work ahead of attachers; (2) often force a new attacher to negotiate with an existing attacher to relocate an attachment or correct a pre-existing safety violation rather than mandating such work; (3) fail to correct safety violations on a timely basis or permit qualified third parties to perform the work; (4)

delay make-ready work, thereby forcing TWTC to lay cables underground at its own expense to meet customer install deadlines, even though underground installation is generally more expensive than pole attachments; (5) render pole attachments uneconomic by requiring unnecessary pole replacement rather than rearrangement on an existing pole; (6) take up to 90 days to perform pole surveys, a step that precedes the commencement of make ready work; and (7) charge the last attacher left on the pole the entire cost of disposing of the pole when attachers must relocate to new poles.

Similarly, as the declaration of Robert Legg of FiberNet (a One Communications subsidiary) appended hereto demonstrates,[28] other competitors seeking to deploy facilities for the provision of broadband internet access are experiencing similar problems. For example, it sometimes takes Verizon over 200 days to complete the preliminary survey work to determine if make-ready work is even necessary for FiberNet's attachments. *See id.* ¶ 4. If make-ready work is required, the survey work (including engineering and planning the make ready work) routinely takes up to 90 days and sometimes takes six months or more. *See id.* ¶ 5. As a result, in at least two cases, Verizon has still not completed make ready-work even after 11 months have passed since the application was filed. *See id.* FiberNet is also routinely charged by utilities to correct errors caused by prior attachers to prepare the pole for Fibernet's attachment. *See id.* ¶¶ 6-8. In one case, as part of its make ready charges, the contractor for the pole owner, American Electric Power ("AEP"), is charging FiberNet to move the attachments of two pre-existing attachers to another pole even though there is no nexus between FiberNet's attachment and the need to move the cable attachers. *See id.* ¶ 9. In another case, AEP's contractor

[28] Declaration of Robert Legg, FiberNet, appended hereto as Appendix A..

is charging FiberNet to replace an existing pole with a longer pole even though FiberNet's attachment will fit on the existing pole, thereby forcing FiberNet to subsidize AEP's future growth. *See id.* ¶ 10. Conduct such as this unnecessarily increases FiberNet's costs and diminishes the resources available to deploy broadband internet access to consumers.

A. Adoption of National Rules Governing Access to Poles Is Sound Public Policy

To address the pole owners' inefficient and anticompetitive conduct, both Fibernet and TWTC have proposed a number of modest rules that would serve to substantially diminish this behavior. *See generally* TWTC Non-Price Remedies Letter; TWTC Reply Comments. It is unnecessary to repeat all of those proposals here, but, in general, TWTC, One and COMPTEL support the following:

- Adopting Fibertech's proposals, including permitting the use of pole boxing and extension arms in appropriate circumstances (*see* TWTC Reply Comments at 2);
- Establishing rules that regulate the timeframe for inspections and make-ready work, such as a requirement that pole owners complete make ready work on projects involving fewer than 500 poles within *approximately* 60 days[29] of the pole owner's acceptance of a pole attachment application (*see* TWTC Non-Price Remedies Letter at 3; TWTC Reply Comments at 3);
- Ensuring that make-ready costs and other expenses charged by pole owners are reasonable, applied in a non-discriminatory manner, and recover only actual costs (*see* TWTC Non-Price Remedies Letter at 2);

[29] This time includes 30 days for survey and engineering work and a 30 day period for make ready work triggered by payment by the attacher for the work. Because survey work may take less than 30 days or the attacher may submit its payment after 30 days have passed from the time of application, the total time from application to completion of make ready work may be more than or less than 75 days. As explained below, this general approach has been adopted by several states. While TWTC previously supported a 45 day make-ready window for projects involving fewer than 100 poles, TWTC, One and COMPTEL now support a 30 day rule for projects involving fewer than 500 poles in light of California's adoption of this approach (see Section III.C *infra*)

- Ensuring that a new attacher whose attachment requires that incumbent attachers rearrange or transfer their facilities is only required to reimburse incumbents for expenses the incumbents would not have incurred but for the new attachment (*see id*.);

- Ensuring that the newest attacher does not bear the cost of correcting a pre-existing safety violation on a pole (*see* TWTC Non-Price Remedies Letter at 2; TWTC Reply Comments at 5-6) by, among other things, mandating that pole owners notify an attacher when its improperly placed attachment is preventing a new attacher from attaching on the pole and, if neither the existing attacher nor the utility fixes the error within 30 days, permitting the new attacher to correct the violation and bill the existing attacher (this specific proposal has not been previously offered by TWTC);

- Require that pole owners pay for replacement costs when a pole becomes overburdened or relocated (this specific proposal has not been previously offered by TWTC);

- Reducing delays and costs associated with seeking access to jointly-owned poles (*see* TWTC Non-Price Remedies Letter at 4);

- Improving and streamlining the contracting process (*see* TWTC Non-Price Remedies Letter at 4);

- Clarifying the applicability of pole attachment rules to rural utilities and the meaning of the "notice" required for overlashing (*see* TWTC Non-Price Remedies Letter at 5);

- Requiring pole owners to provide complete and accurate data demonstrating that their pole attachment rates are consistent with the attachment rate formula (*see* TWTC Non-Price Remedies Letter at 2); and

- Permitting the use of third-party contractors approved by the pole owner to perform make-ready work and facilities checks (*see* TWTC Non-Price Remedies Letter at 4; TWTC Reply Comments at 3-4).

The time has come for the FCC to adopt these rules, and the concerns expressed by the Commission in the past regarding the appropriateness of more detailed national rules should be dismissed. In the *Local Competition Order*,[30] for example, the FCC

[30] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, et al.*, First Report and Order, 11 FCC Rcd 15499, ¶ 1150 (1996).

concluded that detailed performance rules would not be appropriate because engineering rules were too varied and what might be an appropriate rule in one instance, might be inappropriate in another. But this concern is no longer valid because (1) the rules proposed by Fibertech, TWTC, One, and COMPTEL do not generally implicate engineering considerations and, if they do, the proposed rules account for varying circumstances (e.g., boxing and extension arms would only be required where safety is not compromised); and (2) some states have already adopted state-wide rules which track the rules proposed by Fibertech, TWTC, One, and COMPTEL even though different pole owners in the state may have different engineering policies and geography and other conditions may vary widely across the state (this is the case for example in New York).

In addition, in its last pole attachment order in 2001, the FCC declined to adopt "separate or detailed regulations at this time for considering complaints about rates, terms and conditions for nondiscriminatory access . . . ."[31] The FCC believed that it would be "prudent to gain experience through case by case adjudication to determine whether additional guiding principles or presumptions are necessary . . . ."[32] But more than six years have now passed since the last pole attachment order. During that time, the FCC has adjudicated dozens of pole attachment disputes, but the resulting decisions have done little to diminish unreasonable conduct by pole owners. Even when the Commission determines in adjudications that conduct is unlawful, many pole owners seem to believe that the adjudication has no application except to the parties to the case. Apparently

[31] *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments et al.*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 45 (2001) ("*Pole Attachment Recon. Order*").

[32] *Id.*

based on this view, pole owners repeatedly engage in precisely the conduct struck down in previous FCC adjudication decisions. As a result, attachers are required to litigate the same issues over and over.

For example, the FCC held in 2003 that a utility may not charge a new attacher to correct preexisting safety violations on the poles, but the Commission had reached the exact same holding in a case in 1999.[33] In addition, numerous parties in response to Fibertech's petition have reported that, notwithstanding the decisions reached in adjudications, pole owners continue to charge new attachers for expenses associated with fixing pre-existing violations. *See, e.g.*, segTel Comments, RM-11303, at 3-4. Similarly, the FCC has repeatedly found that pole owners may not charge excessive punitive penalties (in one case 14 times more than the attachment fee plus additional charges) for unauthorized attachments, but rather may only charge the attachment rate plus interest based on IRS formulas.[34] The fact that the FCC has repeatedly found that pole owners

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[33] *See Knology, Inc. v. Georgia Power Company*, Memorandum Opinion and Order, 18 FCC Rcd 24615, ¶ 37 (2003) ("[I]t is an unjust and unreasonable term and condition of attachment, in violation of section 224 of the Act, for a utility pole owner to hold an attacher responsible for costs arising from the correction of other attachers' safety violations."); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599, ¶ 19 (1999) ("Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner [Cable]'s attachment to keep the pole within NESC standards should be borne by Time Warner.").

[34] *Mile Hi Cable Partners v. Public Service Company of Colorado*, Order, 15 FCC Rcd 11450, ¶ 14 (2000) ("We believe that a reasonable penalty for unauthorized attachments will not exceed an amount approximately equal to the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less, plus interest at a rate set for that period by the Internal Revenue Service ('IRS') for individual underpayments pursuant to Section 6621 of the Internal Revenue Code.") (This decision was affirmed by the full Commission in *Mile Hi Cable Partners v. Public Service Company of Colorado*, Order, 17 FCC Rcd 6268 (2002) and later affirmed by the D.C. Circuit.); *see also Salsgiver Communications, Inc. v. North Pittsburgh Telephone Company*, Memorandum Opinion and Order, 22 FCC Rcd 20536, ¶ 28 (2007) ("Section

have violated this principle and that pole owners continue to include language in their standard attachment agreements that is impermissible under these rulings demonstrates that the adjudicatory process is not effectively constraining pole owners conduct. The FCC has also been forced to repeatedly admonish pole owners that they may not charge attachers separately for pole audits, but rather must charge all attachers in accordance with the pole attachment formula.[35] Rules of general applicability should diminish the need for such repetitive litigation by removing any doubt that the principles in question apply to all pole owners.

There is also no reason to limit the adoption of rules to issues that have been addressed in previous adjudications. By adopting rules based on the problems reported by attachers in this proceeding, the Commission can deliver substantial prospective

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5.7.1 of the Agreement imposes a "penalty charge" of $250 for each unauthorized attachment, in addition to back attachment fees. We agree with Salsgiver's contention that this penalty charge directly conflicts with Commission precedent. The Commission has previously found unlawful a similar $250 'unauthorized attachment fee.' In *Mile Hi Cable Partners*, the Commission applied general contract principles prohibiting the enforcement of unreasonable penalties for breach of contract, and limited the utility to compensatory damages, where there was no specific record to support punitive damages. Similarly, here we find that it would be unreasonable for NPTC to charge a $250 per attachment penalty, above and beyond compensatory damages, without a specific basis to justify such charges. NPTC asserts that the *Mile Hi Cable Partners* precedent is irrelevant, but offers no cogent basis for its assertion. NPTC also fails to explain how the charge is anything but punitive. We therefore direct NPTC, within 60 days, to amend the Pole Attachment Agreement to limit the penalty for unauthorized attachments to compensatory damages, in accordance with *Mile Hi Cable Partners.*").

[35] *The Cable Television Association of Georgia v. Georgia Power Company*, Order, 18 FCC Rcd 16333, ¶ 16 (2003) ("costs attendant to routine inspections of poles, which benefit all attachers, should be included in the maintenance costs account and allocated to each attacher in accordance with the Commission's formula. Consequently, we find the New Contract's provision requiring the Cable Operators to pay for routine pole inspections to be unreasonable"); *see also Cable Texas v. Entergy Services Inc.*, Order, 14 FCC Rcd 6647, ¶ 13 (1999); *Newport News Cablevision v. Virginia Electric & Power Co.*, Order, 7 FCC Rcd 2610, ¶ 8 (1992).

benefits. For example, clear rules reduce costs for both attachers and utilities by obviating the need to establish a rule of law through costly adjudications. By establishing prospective rules, the Commission can also eliminate regulatory uncertainty, thus making it more likely that competitors will deploy facilities, including those needed to provide broadband internet access, via pole attachments. Prospective rules of general applicability also reduce opportunities for pole owners to engage in harmful strategic conduct. Pole owners may delay, degrade and overprice pole access based on the judgment that an attacher lacks the resources to bring a pole attachment complaint or that the harm to the attacher, while significant, is less substantial than the cost of litigation. Finally, even if the pole owner's conduct is egregious and the attacher is likely to win on the merits, adjudications can take many months, severely harming competitors' businesses in the process.

The FCC has recognized that detailed rules designed to prevent non-price discrimination are appropriate where, as here, one firm has monopoly control over an essential, or at least the most efficient, input of production needed by others. Most obviously, the FCC concluded in the context of local exchange competition that the mere bar on unreasonable and discriminatory conduct in Sections 201 and 202, the general duties enumerated in Section 251 and the right to bring a Section 208 complaint against a carrier were insufficient to prevent unreasonable or discriminatory behavior by the ILECs. For this reason, the FCC imposed specific performance mandates on ILECs. For example, the FCC established detailed performance benchmarks in the 271 review context (e.g., OSS requirements) and, just this past year, established detailed performance

metrics for special access services for all three RBOCs.[36] The FCC did so because it realized that, even though there is some local exchange competition, ILECs could use their continued bottleneck control over local exchange facilities to engage in non-price discrimination. *See 272 Sunset Order* ¶ 97.

The case for detailed performance rules in the pole attachment context is even greater. While CLECs have captured at least some portion of the local exchange market and CLEC wholesalers do exist at least in some product and geographic markets, there are essentially *no competitive providers of poles*.[37] As a result, a pole owner's incentive and ability to act in an unjust, unreasonable and discriminatory manner exceeds even that of an ILEC competing in the local exchange market. Accordingly, performance rules are appropriate and necessary to constrain pole owners' behavior.

B. The FCC Should Reject Arguments Raised By Pole Owners Against Adoption Of National Rules

The utilities have made several arguments in an attempt to convince the Commission that it should not or may not adopt national rules or that adoption *of* such rules would be bad policy. None of these arguments is persuasive. For example, the Commission should reject the pole owners' overblown claims that the rule changes proposed by Fibertech pose significant safety risks. For example, NSTAR Electric has argued that boxing and the use of extension arms should not be permitted because they

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[36] *See Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements et al.*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 (2007) ("*272 Sunset Order*").

[37] As the FCC noted "As the Court stated in *Gulf Power II*, contrary to American Electric's assertions, the original purpose of the Pole Attachment Act, to prevent utilities from charging monopoly rents to attach to their bottleneck facilities, did not change with the 1996 Act. Nothing in the record demonstrates that the utilities' monopoly over poles has since changed." *Pole Attachment Recon. Order* ¶ 13.

"render the pole unclimbable" pursuant to NESC requirements. *See* NSTAR Reply Comments, RM-11303, at 2. Verizon has raised similar concerns. *See* Verizon Comments, RM-11303, at 2. However, as Fibertech has explained, boxing and extension arms would only be permitted under its proposal in those instances where the pole is accessible by bucket truck, eliminating the need to climb poles. *See* Fibertech Reply Comments, RM-11303, at 23.[38] Given that the evidence indicates that Verizon boxes its own poles at a much higher rate than it permits competitors to do so (*see id.* at 27) and that states have begun to mandate the use of boxing and extension arms, there can be no other conclusion that Verizon's cries of safety are a fig leaf to obscure its own discriminatory behavior. The FCC must step in to mandate boxing an extension arms in those instances where safety concerns can be satisfied.

The utilities have also argued that the Act does "not grant the Commission jurisdiction to determine what are reasonable, necessary, safety, reliability and engineering standards." Ameren Comments, RM-11303, at 7. While the FCC has, as Ameren notes, sometimes rejected particular proposed safety standards (*see id.* at 2), the FCC has never held that it lacks jurisdiction to address these issues under its authority to regulate pole attachments. The text of the statute itself sweeps broadly, granting the FCC the authority "to regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1).

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[38] As TWTC has shown, this exclusion for non-bucket truck *accessible* poles would still permit installation of extension arms on the vast majority of attachments. *See* TWTC Jarvis Declaration ¶ 6, attached to TWTC Reply Comments, RM-11303, appended hereto as Appendix B ("The pole owners assert that such climbing space is required for transmission line personnel to reach the top of the pole. However, most pole owners deploy bucket trucks in order to access pole attachments.").

There is no reason to believe, and pole owners have offered none, that the "terms" and "conditions" of pole attachments does not or should not encompass engineering or safety standards imposed by the pole owners.

Indeed, the FCC has repeatedly passed upon safety and engineering questions in its pole attachment rulemakings. For example, the FCC adopted the "rebuttable presumption" that a cable or telecommunications attacher occupies a half-duct of space in order to determine the sharing of space between electric and communications.[39] In adopting the rule, the FCC noted that the NESC "does not prohibit the sharing of space between electric and communications." *Telecom Order* ¶ 115. This is also an instance where the FCC followed the lead of a state (Massachusetts) in adopting an engineering policy.[40] As the FCC observed, "The [Massachusetts Commission] finds, and we agree, that this method is reasonable because an attacher's use of a duct does not preclude the use of the other half of the duct." *Id.* The FCC essentially reaffirmed this decision on reconsideration.[41] The FCC also mandated 40 inches of "safety space" "to minimize the likelihood of physical contact between employees working on cable television or telephone lines and the potentially lethal voltage carried by the electric lines, as well as to

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[39] *Implementation of Section 703(e)of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777, ¶ 115 (1998) ("*Telecom Order*").

[40] Ameren argues that states have the exclusive right to implement safety and engineering standards. *See* Ameren Comments, RM-11303, at 11. Whatever the merits of this argument may be for states that have exercised their right to reverse preemption (*see id.* at 11-12), that has no bearing on whether the FCC can and should adopt such regulations for those states which have not exercised their right to reverse preemption.

[41] *Pole Attachment Recon. Order* ¶ 97 ("We affirm our position that, because the NESC rule relied on by the electric utilities does not prohibit the sharing of a duct by electric and communications cables when controlled by the same party or two communications cables, it is reasonable to expect there to be more than one attacher in a duct.").

prevent electrical contact between such cables."[42] Similarly, the FCC took the NESC and other engineering concerns into account in determining that 18 feet of pole space is reserved for ground clearance. As the FCC found, "In the *Usable Space Order* we carefully considered numerous studies submitted to us before concluding that the 18 foot figure was an appropriate tool to estimate usable space." *Id.* ¶ 23. Given these past holdings, there can be no doubt that the FCC retains jurisdiction to establish rules that bear on engineering standards.

C. Many States Have Adopted the Rules Supported By Fibertech, TWTC, One, and COMPTEL

In recent years, states have adopted many of the proposals supported by Fibertech, TWTC, One, and COMPTEL. The state decisions support the conclusion that these rules are sensible, not overly burdensome and can be implemented without endangering pole safety. Fibertech and other commenters discussed in detail the regulations adopted by the NYPSC regarding, among other things, the use of boxing and extension arms and a 45 day make ready period triggered by the receipt of payment from the attacher. The NYPSC order provided a model for other states and several other state Commissions have adopted similar rules. The FCC should follow the lead of these states and adopt similar rules.

For example, in late 2006, the Maine PUC adopted many of the same regulations as the NYPSC and, in so doing explicitly cited to the NYPSC order.[43] *First*, the PUC

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[42] *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453, ¶ 20 (2000).

[43] *Oxford Networks Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Docket No. 2005-486, 2006 Me. PUC LEXIS 390 (Oct. 26, 2006) ("*Oxford Networks*").

rejected Verizon's position that it should not be obligated to provide boxing and extension arms. The PUC found that "[c]ontrary to the positions of Verizon, the applicable codes and several documents presented during this proceeding confirm that boxing is an accepted practice in the industry. . . . Neither the NESC nor the Blue Book prohibit or restrict boxing." *Oxford Networks*, 2006 Me. PUC LEXIS 390, at *30-31. The PUC was also "informed by a policy statement recently adopted by the [NYPSC] on a variety of pole attachment issues, including the boxing of poles." *Id.* at *32. As Fibertech has proposed in its petition, the PUC restricted boxing to poles that can be accessed by bucket trucks. The PUC found that this limitation would "alleviate, to a large degree, the safety concerns of Verizon and the T&D Utilities regarding the boxing of poles." *Id.* at *34. Similarly, because Verizon's own engineering guidelines permit extension arms, the PUC found that their use should not be prohibited. *See id.* at *35.

Second, the PUC found that "Verizon's 180 day maximum for the completion of make-ready work" was unreasonable. *See id.* at *36. The PUC noted that Verizon's time frame is "substantially longer than the 45 day maximum period in the NYPSC policy statement." *Id.* Therefore, the PUC required that Verizon "complete all make-ready work within 45 days" so long as pole replacement was not necessary." *Id.* at *37.

Vermont's pole attachment rules also mirror the proposals of Fibertech, TWTC and others in this docket. *First*, Vermont's rules provide similar protection to attachers that seek to adopt the "least cost" method of make ready work (including presumably boxing and extension arms) that has already been adopted by the pole owner for its own attachments. The Vermont PSB rules provide that, in completing make-ready work, the pole owner "shall pursue reasonable least-cost alternatives, including space saving

techniques currently relied upon by that utility." Vermont PSB, Rule 3.708(F). If the pole owner uses these least-cost alternatives "as part of its normal operating procedures but refuses to utilize such techniques for the benefit of the entity seeking attachment, [the attacher] shall only be responsible for the cost that would have been incurred had such techniques been utilized." *Id.* at 3.708(H)(3). *Second*, the Vermont rules also prohibit charging and attacher for "any portion of the Make-ready" expense that is attributable to the correction of preexisting violations unless the attacher caused a portion of that violation. *Id.* at 3.708(H)(1). Instead, the PSB held that the cost of modification should be apportioned among the existing attachers. *Id.* at 3.708(H)(3). *Third*, Vermont rules also state that, if the make-ready work cannot be completed on time, "the attaching entity may demand that outside contractors" may be sought and hired from a utility approved list of third party contractors to complete the make-ready work. *Id.* at 3.708(G).

States outside of the Verizon region have also adopted rules similar to those proposed by Fibertech. For example, in a 1998 PUC order, California imposed similar guidelines regarding make-ready work and use of third party contractors. That order mandated that Pacific Bell and GTE complete make ready work "within 30 business days of receipt of an advance payment for such work" if the work involves fewer than 500 poles or 5 miles of conduit.[44] The California PUC also mandated that ILECs maintain a list of qualified third party contractors that are available to perform make-ready work. Under the California rules, an attacher can use its own personnel to attach or install the facilities "provided that in the utility's reasonable judgment, the carrier's or cable TV

[44] *Cal. Pole Attachment Order* at 142.

company's personnel or agents demonstrate that they are trained and qualified to work on or in the utilities' facilities."[45] *Id*.

As with the adoption of unified pole rental rates, the states' decisions regarding the terms and conditions of pole access offer a helpful guide for FCC action. To be sure, the states have not adopted all of the regulations supported by Fibertech, TWTC, One and COMPTEL that are necessary for stemming pole owners' unreasonable conduct. But the states have made substantial progress where the FCC has made virtually none. The Commission must now meet and surpass the states by adopting comprehensive behavioral requirements for pole owners consistent with the rules proposed and supported by Fibertech, TWTC, One and COMPTEL. Moreover, it bears emphasis that the Commission can only establish the preconditions for efficient competition in the provision of broadband internet access if it adopts both the necessary behavioral requirements and a competively-neutral, single unified rate applicable to all attachers. Both steps are needed to advance the policy goal of broadband deployment articulated by Congress in Section 706 of the Communications Act.

[45] *Id.*

IV. CONCLUSION

For the foregoing reasons, TWTC's, One's and COMPTEL's recommended reforms to the pole attachment rules should be adopted.

Respectfully submitted,

/s/

Thomas Jones
Jonathan Lechter
Grace Koh
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

ATTORNEYS FOR TIME WARNER TELECOM INC. AND ONE COMMUNICATIONS CORP.

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March 7, 2008

Appendix A

Declaration of Robert Legg, One Communications Corp.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 07-245
Implementation of Section 224 of the Act;	)	
Amendment of the Commission's Rules and	)	RM-11293
Policies Governing Pole Attachments	)	
	)	RM-11303

Declaration of Robert Legg

I, Robert Legg, declare as follows:

1. I am employed by FiberNet, a One Communications company, as Manager - Network Planning and Optimization. FiberNet is a competitive local exchange carrier that operates in West Virginia and several surrounding states. My duties include managing FiberNet's pole attachments and the applications to pole owners for such attachments. The information in this declaration was compiled by employees of FiberNet under my supervision.

2. The amount of time that elapses between FiberNet's submission of a pole attachment application and the pole owner's response is highly variable and sometimes quite extended. Exhibit A is a chart showing FiberNet's pole attachment applications in 2007 and thus far in 2008 to Verizon, a major pole owner in West Virginia.

3. The column entitled "Days to Receipt of Make Ready Letter" generally reflects the amount of time it takes Verizon to make the engineering determination whether make-ready work is necessary. This determination is generally known as a pole "survey." The Column entitled "Days to Complete Make Ready Work" shows the amount of time it took to perform the make-ready work itself. For "pending"

applications, the number of days is calculated as of February 29, 2008.

4. As the chart shows, Verizon generally can complete its survey work and make the determination that no make-ready work is required within 45 days after FiberNet submits its application. Examples of this include FNWV 705-706, 714-719, 720, and 731. However, not all determinations that no make-ready is required are made in a reasonable time frame. For example, FNWV710 took 106 days to determine that no make-ready was necessary.

5. When Verizon determines that make-ready work is required, however, the time for it to make that determination and complete the survey work (which includes engineering, but not performing, the work) becomes much longer. Time periods of 60-90 days are the rule, not the exception, and some make ready determinations can take six months or more. See FNWV 704 (217 days), FNWV711 (240 days), and FNWV712 (215 days).

6. When coupled with lengthy construction durations, the delays associated with make-ready work can become excessive. See, for example, FNWV704, which has taken over a year and is still not complete, FNWV711, not complete after ten months, and FNWV712, not complete after nine months. During this period, of course, FiberNet is providing no service over, and realizing no revenue from, the proposed facilities.

7. Charges for make-ready surveys and work can be unclear, duplicative, and inappropriate. In some cases, FiberNet has been charged make-ready charges to correct existing conditions for which FiberNet is not responsible. An example is Proposal No. CFBN07-0066, a copy of which is attached at Exhibit B. Here, the engineering contractor for the pole owner, American Electric Power ("AEP"), has proposed to charge

FiberNet $655 in engineering fees. Part of these charges appear to result from pre-existing conditions that the contractor recommends be corrected. On pole 38820235C10083 (top left of the drawing at page 4), the contractor is recommending that it notify Verizon to raise one attachment from 23' 10" to 26' 4", and to raise another attachment from 23' to 25' 4". Similarly, on pole 38820235C10119 (top center of the drawing), AEP's engineering contractor is proposing to notify Verizon to raise its cable to achieve sufficient mid-span clearance. Thus, in both cases, AEP's contractor has proposed to charge FiberNet for engineering necessary for Verizon to correct pre-existing conditions on AEP's poles. This pre-existing condition is not the result of any act or omission on the part of FiberNet, and FiberNet and should not have to pay the cost to determine how Verizon must remedy the situation.

8. Similarly, on Proposal No. 123108-0123, a copy of which is attached as Exhibit C, AEP's engineering contractor proposes to assess $2,856.29 in make ready costs, of which $2,693.41 is listed as "Existing Make-Ready Cost" – apparently, related to existing conditions.

9. Another case is Proposal No. CFBN07-0067, a copy of which is attached as Exhibit D. AEP's contractor is recommending that Verizon and Comcast attach to pole no. 38820188D31002 (middle right on the diagram), to which they are not currently attached. Although this action has nothing to do with FiberNet, the contractor proposes to charge FiberNet for the engineering work that led to this recommendation.

10. Also in Proposal No. CFBN07-0067, AEP's contractor is proposing unnecessary work and seeking to charge FiberNet. On pole no. 38820188D30884 (top left on the diagram), the contractor has recommended replacement of the existing 45 foot

pole with a 50 foot pole. As a result, FiberNet has been assessed both engineering and make-ready charges. Because of the existing unused space on the pole, however, it is not necessary to increase the height of the pole to accommodate FiberNet's proposed attachments. Therefore, it appears that the increased height will be used to accommodate future growth. Since the pole attachments proposed by FiberNet may be accommodated on the existing pole, FiberNet should not have to pay for such future growth.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge and belief.

March 7th, 2008
Date

Robert Legg
Robert Legg

Exhibit A

Fibernet Pole Attachment Applications to Verizon

Application	Status	Date Appl Submitted	Notice of Make Ready	Notice of Completion	Days to Receipt of Make Ready Letter	Days to Complete Make Ready Work
FNWV700	COMPLETE	2/21/2007	4/2/2007	5/22/2007	40	50
FNWV701	COMPLETE	2/21/2007	5/7/2007	5/22/2007	75	15
FNWV702	COMPLETE	2/21/2007	4/2/2007	5/18/2007	40	46
FNWV703	COMPLETE	2/21/2007	4/9/2007	5/18/2007	47	39
FNWV704	Pending	3/1/2007	10/4/2007		217	139
FNWV705	COMPLETE	3/1/2007	NO	3/15/2007	14	
FNWV706	COMPLETE	2/22/2007	NO	3/15/2007	21	
FNWV707	COMPLETE	4/2/2007	7/26/2007	8/2/2007	115	7
FNWV708	COMPLETE	5/31/2007	NO			
FNWV710	COMPLETE	4/9/2007	NO	7/26/2007	108	
FNWV711	Pending	5/7/2007	1/2/2008		240	49
FNWV712	Pending	6/1/2007	1/2/2008		215	49
FNWV713		5/16/2007	7/18/2007	9/20/2007	63	64
FNWV714	COMPLETE	5/16/2007	NO	6/21/2007	36	
FNWV715	COMPLETE	4/27/2007	NO	5/23/2007	26	
FNWV716	COMPLETE	4/27/2007	NO	5/31/2007	34	
FNWV717	COMPLETE	4/27/2007	NO	6/5/2007	39	
FNWV718	COMPLETE	4/27/2007	NO	6/5/2007	39	
FNWV719	COMPLETE	5/17/2007	NO	6/30/2007	44	
FNWV720	COMPLETE	6/25/2007	NO	8/3/2007	39	
FNWV721	COMPLETE	6/15/2007	NO	8/3/2007	49	
FNWV724	Cancelled					
FNWV725	Cancelled					
FNWV726		8/24/2007	11/1/2007	1/24/2008	69	84
FNWV727	Pending	8/24/2007	1/2/2008		134	49
FNWV730	Pending	10/11/2007	12/3/2007		98	
FNWV731	COMPLETE	11/5/2007	NO	12/3/2007	28	
FNWV732	On hold					
FNWV733	On hold					
FNWV734	On hold					
FNWV735	Pending	1/3/2008	Pending		57	
FNWV736	Cancelled					
FNWV739	Pending	12/12/2007	Pending		79	
FNWV741	Pending	12/12/2007	Pending		79	
FNWV742	Pending	1/3/2008	Pending		57	
FNWV745	Pending	1/3/2008	Pending		57	

"Pending" data as of: 2/29/2008

Exhibit B

560 Officenter Place
Gahanna, Ohio 43230
Ph: 614-470-9882
Fax: 614-470-9886
www.ijus.net

Facsimile Cover Sheet

DATE: 2/7/08 FROM: IJUS Joint Inspection Team

cc: Penny McGinnis - AEP

TO: Mike Ryder

COMPANY: Fiber Net

PROPOSAL NUMBER: CFBN07-0066

WORK ORDER NUMBER: W0009189

WORK REQUEST NUMBER:

SUBJECT: Make Ready Estimate

Total Pages: 4 (including cover sheet)

If you do not receive the indicated number of pages, please call (614) 470-9882

COMMENTS:

Please review the following copy of a Make Ready Estimate letter. If you choose to accept this estimate and proceed with releasing the work, please forward the payment, in full, to Penny McGinnis, P.O Box 1986, Charleston, WV 25327.

Remember that you have only 30 days to respond, one-way or another. Should you choose not to respond, your proposal will be cancelled and permission to attach will not be granted.

If you have any questions, please feel free to call IJUS at (614) 470-9882.

Thank you.

Page 4 to follow by mail

AEP APPALACHIAN POWER®

A unit of American Electric Power

Date: 2/1/08

Fiber Net
ATT: Mike Ryder
211 Leon Sullivan Way
Charleston, WV 25301

Re: PROPOSAL No: CFBN07-0066

Dear: **Fiber Net**

The costs listed below are to cover make-ready construction work identified during a field inspection of the above noted Proposal. Attached are drawings and/or sketches indicating the construction work required. If you would like American Electric Power (AEP) to proceed with this work, **please remit payment IN FULL** for the total amount.

- ***Payment must be received within thirty - (30) days from the date of this letter.***
- ***Another invoice will not be provided; therefore, this letter will serve as your invoice for payment.***

Total Engineering Cost:	$ 655.00		
Total Make Ready Cost:	$ -	**W Work Order #:**	W0009189
Overhead Make Ready Cost:	$ -	**Overhead Work Order #:**	-
Existing Make Ready Cost:	$ -	**Overhead Work Request #:**	-
Right-of-Way Cost:	$ -		

Total for Proposal: $ 655.00

If payment is not received within this timeframe, AEP will consider this Proposal **Cancelled**, and permission to attach is hereby **Denied**. Should you desire to attach to these poles in the future, a new Proposal will be required.

Note: The Proposal Number, indicated above, *must be included* on all checks and mailed to:

Ms. Penny McGinnis
American Electric Power
404 29th St West
Charleston, WV 25312

If you should have any questions regarding this make-ready work, please contact April Jewett at (614) 470-9882.

Sincerely,

Penny McGinnis
AEP
Attachments

IJUS Distribution Billing Results For AEP

AEP APCO

Start Date: 02/01/2008
End Date: 02/01/2008

Proposal: ALL

Company Code: CFBN Fibernet

Company Billing WO Number: W0009189

Proposal Number: CFBN07-0066

Date	Billing Item	Qty	Item Cost	Total Cost
02/01/2008	"OK to Attach" Poles	3	$45.00	$135.00
02/01/2008	Administrative Processing	5	$2.00	$10.00
02/01/2008	Hard-Copy Proposal Processing (per proposal)	1	$35.00	$35.00
02/01/2008	Pole Evaluation	5	$45.00	$225.00
02/01/2008	Remediate Standard Pole	2	$125.00	$250.00

Proposal Total: $ 655.00

Company Billing WO Number Total: $ 655.00

Company Total: $ 655.00

* Numbers in parentheses indicate a credit
Printed: 02/01/2008
Printed by LD-Field Proposal Tracking™, a product of IJUS, LLC.®

38820235C10083
1-1
SP
Trace Fork & Ruth Rd
EGC-SE; PPC

Comcast:
- At 27'10" lower 6" to 27'4"

Verizon:
- At 23'10" raise 2'6" to 26'4"
- At 23' raise 2'4" to 25'4"

FiberNet:
- Attach at 28'4"
- Install down guy at 28'4" and anchor for span to the southeast

38820235C10119
1-4
SE
Trace Fork & Ruth Rd
EGC-E

Verizon:
- Resag span east; midspan at 8'5" sag up 3'7" to 12"

FiberNet:
- Attach at 22'9"

RUTH

1350 KVAR

400W MV

900 KVAR

3-600 ABC
SW 1390 NC

3-600 ABC
SW 1395 NC
SW 1418 NC

3-600 ABC
SW 1171 NC

200W HS

2-200 L AB
300 SW

LONG BRANCH RD

WILLOW DR

PAXTON WAY

PRELIMINARY
NOT FOR CONSTRUCTION PURPOSES

IJUS	560 Officenter Place Gahanna, Ohio 43230 (614) 470-9882 www.ijus.net
N	Sheet 1 OF 1
Design Date:	1-18-2007
Rev. Date:	
Design By:	B. WALTERS
Drawn By:	A. JEWETT
Proposal #:	CFBN07-0066
Map #:	38820235C1
Map #:	
Cty/Twnshp:	S. CHARLESTON
County:	KANAWHA
State:	WV
OK Poles △	2 3 5
WO#:	WR#:

	Utility	Other	Total
Pole Count	5	0	5
New Attachments	5	0	5
Overlash	0	0	0
Rearrangement	2	0	2
Midspan Poles	0	0	0
Pole Replacements	0	0	0

Communication cables shall be no closer than 40" from utility conductors at pole and 30" plus sag at midspan.

All Companies must identify attachments with an ID wrap.

Drawing Titles
E(P)PC – Existing (Proposed) at pole clearance problem
E(P)GC – Existing (Proposed) ground clearance problem
E(P)BC – Existing (Proposed) between clearance problem
E(P)NA – Existing (Proposed) not attached to pole
E(P)OL – Existing (Proposed) pole overload
E(P)GA – Existing (Proposed) guy/anchor problem
E(P)JH – Existing (Proposed) attached to J-Hook
E(P)GW – Existing (Proposed) ground wire conflict

1/29/2008 9:25:24 AM, AJew

Exhibit C

Date: 2/20/08

FIBERNET
ATT: Keith Ratliff
211 Leon Sullivan Way
Charleston, WV 25301

Re: PROPOSAL No: 123108-0123

Dear: ***FIBERNET***

IJUS is a contractor working for American Electric Power's operating company AEP-Ohio, performing engineering work on your pole attachment proposals that were recently received.

The costs listed below are to cover the make ready work identified during a field inspection of the above listed proposal. Attached are drawings and/or sketches indicating the construction work required. If you would like American Electric Power to proceed with this work **please remit payment IN FULL** for the Make Ready.

- Payment must be received within thirty (30) days from the date of this letter.
- Another invoice will not be provided for the construction make ready; therefore, this letter will serve as your invoice for payment
- You will receive an invoice from AEP for engineering/right-of-way/administrative costs associated with this proposal on a quarterly billing schedule.

Total Make Ready Cost	$ 2,856.29	W Work Order #	100016951
Overhead Make Ready Cost	$ 162.88	Overhead Work Order #	DGS0099316
Existing Make Ready Cost	$ 2,693.41	Overhead Work Request #	22805090
Right of Way Cost	$		
Estimated Engineering Cost	$ 1,009.00		

Make Ready Cost: $ 2,856.29

If payment is not received within this timeframe, AEP will consider this proposal CANCELLED, and permission to attach is hereby DENIED. Should you desire to attach to these poles in the future; a new Proposal will be required.

Note: The Proposal Number, indicated above, *must be included* on all checks and mailed to:

Ms. Debbie Lewis
American Electric Power
625 Hardin Dr.
Chillicothe, Ohio 45601

If you have any questions regarding this make ready work please contact **April Jewett** at (614) 470-9882.

Sincerely
IJUS

IJUS Distribution Billing Results For AEP

AEP Athens

Start Date: 02/14/2008
End Date: 02/14/2008 **Proposal:** ALL

Company Code: 1231 FiberNet

Company Billing WO Number: W0016951

Proposal Number: 123108-0123

Date	Billing Item	Qty	Item Cost	Total Cost
02/14/2008	"OK to Attach" Poles	1	$35.00	$35.00
02/14/2008	Administrative Processing	6	$2.00	$12.00
02/14/2008	Hard-Copy Proposal Processing (per proposal)	1	$35.00	$35.00
02/14/2008	Pole Evaluation	6	$45.00	$270.00
02/14/2008	Remediate Complex Pole	2	$171.00	$342.00
02/14/2008	Remediate Standard Pole	3	$105.00	$315.00

Proposal Total: $ 1,009.00

Company Billing WO Number Total: $ 1,009.00

Company Total: $ 1,009.00

* Numbers in parentheses indicate a credit
Printed: 02/14/2008
Printed by LD-Field Proposal Tracking™, a product of IJUS, LLC.®

2256907466277
1-4
CE-5/50
Putnam Howe Rd & Park Rd
EGC-SW,NE; PPC

AEP:
- Replace 35' class 5 with a 40' class 5 pole
- Pole to be installed in grass environment
- Construct to C.S. 317
- Attach neutral no lower than 25'7"
- Open wire secondary span to the southwest change out to #6AL triplex secondary and attach at 25'1"
- Attach street light at 24'8" (top bolt)
- Ensure minimum midspan height to the southwest of 21' at midspan
- Ensure secondary drip loop to 25'1"

SuddenLink:
- Attach at 20'9"
- Resag span to the southwest to a minimum final height of 16' at midspan

FiberNet:
- Attach at 21'9"
- Ensure span to the south to be slack
- Install down guy at 21'9" and anchor for span to the northeast

2257066466300
1-3
SE
1519 Putnam Howe Rd
EGA

SuddenLink:
- Install down guy at 18'6" and anchor on the bisector

FiberNet:
- Trim trees for span to the southwest
- Attach at 19'6"
- Install down guy at 19'6" and anchor on the bisector

2257234466346
1-2
SP
1517 Putnam Howe Rd
PPC

SuddenLink:
- At 20'3" lower 6" to 19'9"

FiberNet:
- Attach at 20'9"

2257076466232
2-5
CP
1519 Putnam Howe Rd
EPC; EGA; PPC

AEP:
- ⅜" down guy at 15'2" raise 2'6" to 17'8"

SuddenLink:
- Attach at 15'6"
- Install down guy at 15'6" and anchor for span to the northwest

FiberNet:
- Attach at 16'6"
- Install down guy at 16'6" and anchor for span to the northwest

2257479465976
3-6
SP
1515 Putnam Howe Rd
PPC

SuddenLink:
- At 23'2" lower 8" to 22'6"

FiberNet:
- Attach at 23'6"

PUTNAM HOWE DR
WASHINGTON BLVD

IJUS
560 Officenter Place
Gahanna, Ohio 43230
(614) 470-9882
www.ijus.net

N

Sheet 1 OF 1

Design Date:	2-1-2008
Rev. Date:	
Design By:	B. WALTERS
Drawn By:	A. JEWETT
Proposal #:	123108-0123

Map #:	2256466
Map #:	2256464
Cty/Twnshp:	BELPRE
County:	WASHINGTON
State:	OHIO

OK Poles △ 1

WO#: DCSOD99316 WR#: 22865090

	Utility	Other	Total
Pole Count	6	0	6
New Attachments	5	0	5
Overlash	0	0	0
Rearrangement	4	0	4
Midspan Poles	0	0	0
Pole Replacements	1	0	1

Communication cables shall be no closer than 40" from utility conductors at pole and 30" plus sag at midspan.

All Companies must identify attachments with an ID wrap.

Drawing Titles
E(P)PC – Existing (Proposed) at pole clearance problem
E(P)GC – Existing (Proposed) ground clearance problem
E(P)BC – Existing (Proposed) between clearance problem
E(P)NA – Existing (Proposed) not attached to pole
E(P)OL – Existing (Proposed) pole overload
E(P)GA – Existing (Proposed) guy/anchor problem
E(P)JH – Existing (Proposed) attached to J-Hook
E(P)GW – Existing (Proposed) ground wire conflict

2/5/2008 9:39:19 AM, AJewe

Exhibit D

560 Officenter Place
Gahanna, Ohio 43230
Ph: 614-470-9882
Fax: 614-470-9886
www.ijus.net

Facsimile Cover Sheet

DATE: 2/7/08 FROM: IJUS Joint Inspection Team

cc: Penny McGinnis - AEP

TO: Mike Ryder

COMPANY: Fiber Net

PROPOSAL NUMBER: CFBN07-0067

WORK ORDER NUMBER: DAP0121745

WORK REQUEST NUMBER: 22733576

SUBJECT: Make Ready Estimate

Total Pages: 4 (including cover sheet)

If you do not receive the indicated number of pages, please call (614) 470-9882

COMMENTS:

Please review the following copy of a Make Ready Estimate letter. If you choose to accept this estimate and proceed with releasing the work, please forward the payment, in full, to Penny McGinnis, P.O Box 1986, Charleston, WV 25327.

Remember that you have only 30 days to respond, one-way or another. Should you choose not to respond, your proposal will be cancelled and permission to attach will not be granted.

If you have any questions, please feel free to call IJUS at (614) 470-9882.
Thank you.

Page 4 to follows by Mail

AEP APPALACHIAN POWER®

A unit of American Electric Power

Date: 4/7/08

Fiber Net
ATT: Mike Ryder
211 Leon Sullivan Way
Charleston, WV 25301

Re: PROPOSAL No: CFBN07-0067

Dear: **Fiber Net**

The costs listed below are to cover make-ready construction work identified during a field inspection of the above noted Proposal. Attached are drawings and/or sketches indicating the construction work required. If you would like American Electric Power (AEP) to proceed with this work, **please remit payment IN FULL** for the total amount.

- ***Payment must be received within thirty - (30) days from the date of this letter.***
- ***Another invoice will not be provided; therefore, this letter will serve as your invoice for payment.***

Total Engineering Cost:	$ 867.00		
Total Make Ready Cost:	$ 1,183.85	**W Work Order #:**	W0009189
Overhead Make Ready Cost:	$ 83.42	**Overhead Work Order #:**	DAP012745
Existing Make Ready Cost:	$ 1,100.43	**Overhead Work Request #:**	22753516
Right-of-Way Cost:	$ -		

Total for Proposal: $ 2,050.85

If payment is not received within this timeframe, AEP will consider this Proposal **Cancelled**, and permission to attach is hereby **Denied**. Should you desire to attach to these poles in the future, a new Proposal will be required.

Note: The Proposal Number, indicated above, *must be included* on all checks and mailed to:

Ms. Penny McGinnis
American Electric Power
404 29th St West
Charleston, WV 25312

If you should have any questions regarding this make-ready work, please contact April Jewett at (614) 470-9882.

Sincerely,

Penny McGinnis
AEP
Attachments

IJUS Distribution Billing Results For AEP
AEP APCO

Start Date: 02/01/2008
End Date: 02/01/2008

Proposal:

Company Code: CFBN Fibernet
Company Billing WO Number: W0009189

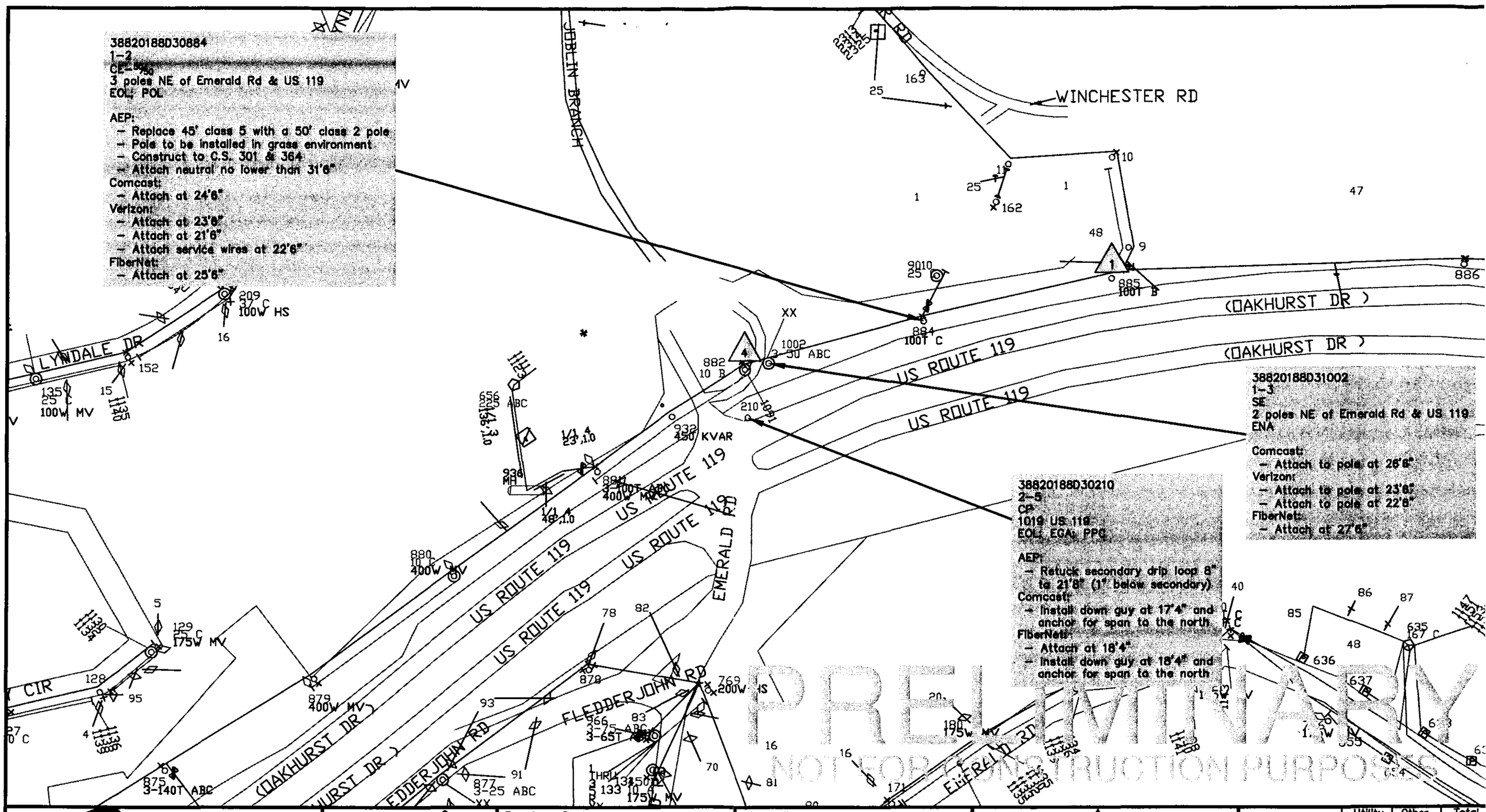
Proposal Number: CFBN07-0067

Date	Billing Item	Qty	Item Cost	Total Cost
02/01/2008	"OK to Attach" Poles	2	$45.00	$90.00
02/01/2008	Administrative Processing	5	$2.00	$10.00
02/01/2008	Hard-Copy Proposal Processing (per proposal)	1	$35.00	$35.00
02/01/2008	Pole Evaluation	5	$45.00	$225.00
02/01/2008	Remediate Complex Pole	2	$191.00	$382.00
02/01/2008	Remediate Standard Pole	1	$125.00	$125.00

Proposal Total: $867.00

Company Billing WO Number Total: $867.00
Company Total: $867.00

* Numbers in parentheses indicate a credit
Printed: 02/01/2008
Printed by LD-Field Proposal Tracking™, a product of IJUS, LLC.®



IJUS	560 Officenter Place Gahanna, Ohio 43230 (614) 470-9882 www.ijus.net
N	Sheet 1 OF 1
Design Date:	1-18-2008
Rev. Date:	
Design By:	B. WALTERS
Drawn By:	A. JEWETT
Proposal #:	CFBN07-0067
Map #:	38830188D3
Map #:	
Cty/Twnshp:	CHARLESTON
County:	KANAWHA
State:	WV
OK Poles	△
1 4	

	Utility	Other	Total
Pole Count	5	0	5
New Attachments	5	0	5
Overlash	0	0	0
Rearrangement	2	0	2
Midspan Poles	0	0	0
Pole Replacements	1	0	1

WO#: DAP012174S WR#: 22753516

Communication cables shall be no closer than 40" from utility conductors at pole and 30" plus sag at midspan.

All Companies must identify attachments with an ID wrap.

Drawing Titles

E(P)PC – Existing (Proposed) at pole clearance problem
E(P)GC – Existing (Proposed) ground clearance problem
E(P)BC – Existing (Proposed) between clearance problem
E(P)NA – Existing (Proposed) not attached to pole
E(P)OL – Existing (Proposed) pole overload
E(P)GA – Existing (Proposed) guy/anchor problem
E(P)JH – Existing (Proposed) attached to J-Hook
E(P)GW – Existing (Proposed) ground wire conflict

1/29/2008 9:24:05 AM, AJew

Appendix B

Ex parte Letter of Time Warner Telecom, Inc., RM-11303 (filed May 11, 2007)
Reply Comments of Time Warner Telecom, Inc., RM-11303 (filed Mar. 1, 2006)

WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
Washington, DC 20006

Tel: 202 303 1000
Fax: 202 303 2000

May 10, 2006

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Ex Parte

Re: In the Matters of Petition for Rulemaking of Fibertech Networks, LLC, WC Docket No. RM-11303 and Petition of the United States Telecom Association for Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures, WC Docket No. 11293

Dear Ms. Dortch:

Time Warner Telecom Inc. ("TWTC"), by its attorneys, hereby submits this *ex parte* letter to supplement its earlier submissions in the above-captioned proceedings.[1] As evidenced by the numerous comments filed in support of the petitions for rulemaking by Fibertech and the United States Telecom Association ("USTA"), utilities' (including incumbent local exchange carriers' ("ILECs'")) exercise of market power over pole attachments is seriously undermining the ability of competitive local exchange carriers ("CLECs") to provide broadband and other services. Accordingly, in addition to redressing the discriminatory rate problem discussed in the TWTC White Paper, the Commission should amend its pole attachment regulations to accomplish the following objectives:

[1] *See* White Paper on Pole Attachment Rates Applicable to Competitive Providers of Broadband Telecommunications Services: Time Warner Telecom Inc., *In the Matters of Petition of the United States Telecom Association for Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures and Petition for Rulemaking of Fibertech Networks, LLC*, WC Docket Nos. RM-11293 and RM-11303 (filed Jan. 16, 2007) ("TWTC White Paper"); *see also* Reply Comments of Time Warner Telecom, *In the Matter of Petition for Rulemaking of Fibertech Networks, LLC*, WC Docket No. RM-11303 (filed Mar. 1, 2006).

Pole Attachment Rate Inputs

- Require pole owners, upon request from an attacher, to provide complete and accurate information necessary to determine whether rates charged by the pole owner are consistent with the rate formula for attachments used to provide telecommunications services, *see* 47 C.F.R. § 1.1409(e)(2).

Make-Ready, Survey, and Inspection Costs

- Ensure that make-ready costs and other expenses charged by pole owners are reasonable and recover only actual costs—

    - For example, while pole owners should be reimbursed for actual engineering costs, they should not be permitted to charge flat fees for application processing and pre-construction surveys that bear no relationship to reasonable, actual costs. *See also* Sigecom, LLC Comments at 8; segTel, Inc. Comments at 11 (survey costs and make-ready work should not be subject to flat fees or upfront payments). Nor should pole owners be permitted to require that attachers pay an audit fee or similar charge in connection with a pole owner's defense of make-ready charges that have been challenged by an attacher as not based on reasonable, actual costs.

    - Pole owners should be prohibited from charging attachers for periodic inspections except through annual rental rate charges.

    - Pole owners should not be able to charge rent for equipment in unusable space (*e.g.*, risers).

    - Pole owners should be permitted to pass through to attachers only reasonable tree trimming costs and only on a *pro rata* basis among all attachers; no single attacher should be required to pay disproportionately for the costs associated with one or more tree trimming project.

    - Pole owners should be limited in their ability to impose financial or other penalties for unauthorized attachments; such actions are typically attempts to assess exorbitant fees.

- Ensure that a new attacher whose attachment requires that incumbent attachers rearrange or transfer their facilities only be required to reimburse incumbents for expenses the incumbents would not have incurred but for the new attachment.

    - For example, if an incumbent has an pre-existing safety violation which is discovered only when it is required to rearrange its attachment, the new attacher should not be required to pay for the expense of fixing such safety violation.

- Equalize pole replacement costs among all attachers when the pole at issue becomes overburdened—

    - Relatedly, segTel, Inc. describes "the frequent reality that previous attachers have wasted space on poles, resulting in new attaching parties having to pay for otherwise unnecessary make-ready work." segTel Comments at 3. Accordingly, segTel suggests that new attachers should not be required to pay make-ready costs for a previous attaching party, including the pole owner itself, when the costs are necessitated by the previous attaching party's facilities having been attached in a manner that wastes pole space. *See id.* at 4. TWTC supports this policy objective.

Eliminating Unnecessary Delays

- Consolidate the time period in which pole owners must complete survey work, application approvals, and make-ready work—

    - While Section 1.1403 of the Commission's rules requires that access to a pole be granted within 45 days of the date that the request is made, there is no such limit on the amount of time in which the pole owner must complete make-ready work, resulting in frequent and excessive delays that can last from several months to several *years*. This problem is most acute with jointly owned poles (addressed below). Accordingly, TWTC agrees with Fibertech and other commenters that have urged the Commission to consolidate the time period for completing surveying, application approval, and make-ready work. Specifically, TWTC supports Fibertech's proposal of a 75-day timeframe for resolution of an application and completion of make-ready work for a project involving at least 100 poles. *See* TWTC Reply Comments at 3; *see also* Indiana Fiber Works, LLC Comments at 4; Sunesys, Inc. Comments at 2; McLeodUSA Telecommunications Services, Inc. Comments at 4; Sigecom, LLC Comments at 4; segTel, Inc. Comments at 6-7.

    - TWTC urges the Commission to require imposition of special penalties on pole owners or incumbent attachers who unnecessarily delay completion of surveying, application approvals, or make-ready work; such penalties could take the form of steep discounts for the harmed attacher (either absorbed by the offending pole owner or paid for by an incumbent attacher guilty of unreasonable delay).

    - Require that tree trimming work be completed within the time frame required for completion of make-ready work. Where tree trimming is required before any additional attachments to a pole are made, tree trimmers are often months behind in their workload.

- Permit attachers to use independent contractors approved by the utility pole owner to complete make-ready work—

    - Such a proposal would prevent utilities from claiming that delays are the result of a labor shortage. *See, e.g.*, Fibertech Petition at 11; Sunesys, Inc. Comments at 8.

- Reduce delays and costs associated with seeking access to jointly-owned poles—

    - TWTC experiences significant delays and faces excessive costs when a given pole is jointly owned by two or more utilities. *See also* segTel, Inc. Comments at 7 (in order to avoid forfeiting its licenses from one utility that had issued segTel the licenses months earlier, segTel must begin paying license fees to the other utility owning the poles, but it cannot begin attaching to any poles until its licenses are granted by both joint owners of the poles); Indiana Fiber Works, LLC at 5 (Indiana Fiber Works sometimes pays double survey costs because it is forced to pay two utilities for survey work for one jointly-owned pole). These problems could be addressed by prohibiting joint owners from utilitizing separate and redundant processes and procedures and conducting separate and redundant make-ready work. The process for accommodating attachers for jointly owned poles should be identical to the process followed where there is a single owner.

Improving the Contracting Process

- Require parties to negotiate pole attachment agreements in good faith.

- Standardize pole attachment agreements; terms and conditions should be standard nationwide or across a particular region, so that attachers are not forced to negotiate with each pole owner.

- Pole owners should be prohibited from requiring that attachers obtain approval for the assignment or transfer of pole attachment agreements between affiliated companies, as defined in Section 153(1) of the Communications Act.

- Permit pole owners to unilaterally terminate a contract only where an attacher has repeatedly failed to make timely payments required by the contract.

- If pole owners are permitted to require prior consent for assigning agreements to the attacher's affiliate, parent, or subsidiary, such prior consent rights must be reciprocal; that is, the attacher must be permitted to require prior consent for assigning agreements to the pole owner's affiliate, parent of subsidiary..

Other Issues

- Prohibit unreasonable pole owner requirements regarding the terms and conditions, including location, applicable to brackets on poles.

- Clarify applicability of pole attachment rules to rural utilities.

- Clarify the meaning of the "notice" required for overlashing.

The record in the above-captioned proceedings is replete with evidence of serious and widespread discrimination against competitive providers in access to utilities' and ILECs' poles. TWTC urges the Commission to address the aforementioned issues, many of which have been raised by other CLECs in the record, in a notice of proposed rulemaking relating to the Commission's rules and policies governing pole attachments. Absent such a rulemaking, the current pole attachment regime will continue to undermine competition between incumbents and CLECs in the provision of broadband services.

Respectfully submitted,

_____/s/_____
Thomas Jones

cc: Marcus Maher
Jeremy Miller

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Petition for Rulemaking of Fibertech Networks LLC	)	RM-11303
	)	

REPLY COMMENTS OF TIME WARNER TELECOM

Willkie Farr & Gallagher LLP
1875 K Street, N.W.,
Washington, D.C. 20006
(202) 303-1000

ATTORNEYS FOR TIME WARNER TELECOM INC.

March 1, 2006

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
Petition for Rulemaking of Fibertech Networks	)	
LLC	)	RM-11303
	)	

REPLY COMMENTS OF TIME WARNER TELECOM

Time Warner Telecom Inc. ("TWTC"), by its attorneys, hereby submits its reply comments in support of the Petition for Rulemaking filed by Fibertech Networks, LLC ("Fibertech") requesting that the Commission initiate a rulemaking and adopt rules establishing "best practices" for providing access to poles, ducts, and conduits.

I. Discussion

In its Petition, Fibertech enumerates various discriminatory practices employed by pole owners to delay and constrain competitors' access to poles, ducts, and conduit. Utilities currently justify this harmful conduct as an exercise of discretionary privilege due to the pole owner to protect the integrity and safety of its network. But these tactics run directly counter to the purposes of Section 224 and should fall outside the limits of pole owner discretion. For the reasons set forth below, TWTC supports the initiation of a rulemaking to articulate a set of reasonable and nondiscriminatory procedures for providing access to poles, ducts, and conduits.

TWTC agrees with Fibertech's description of current practices in the pole attachment application and implementation processes. In fact, TWTC has experienced similar obstacles in the application and implementation processes, which were described

by various commenters and are also described in the attached Declaration of Jeff Jarvis ("Jarvis Dec.")

As with most other commenters,[1] TWTC has encountered significant resistance to the use of extension arms. As explained in the attached declaration, use of extension arms can extend the life of a pole and reduce facilities-deployment costs without undue risk. However, resisting utilities often defend the decision not to use extension arms by arguing that extension arms block climbing spaces. But as Mr. Jarvis explains, transmission line personnel rarely climb poles, opting instead to use bucket trucks and similar equipment. *Id.* ¶ 6. In any event, if properly constructed, extension arms and similar equipment comply with applicable safety codes and generally do not pose obstacles to transmission line personnel. *Id.* Some utilities therefore permit and regularly install extension arms. Jarvis Dec. ¶¶ 6-8. Given the current practices of most transmission line personnel and the inconsistent stance of the pole owners on extension arms, it is clear that safety concerns do not warrant a blanket denial of the use of extensions in all situations. Accordingly, TWTC recommends that the Commission consider adopting rules requiring pole owners to permit the use of extension arms whenever the pole is of sufficient grade to handle the vertical load and bending moment stresses associated with an extension arm.

[1] *See* Sunesys Comments at 5-6; segTEL Comments at 2-3; SigeCom Comments at 3. *See also* Fibertech Petition at 6-7.

TWTC has also encountered unnecessary delays in all phases of the application and implementation process.[2] While some pole owners resolve applications and complete make-ready work efficiently, most pole attachment preparation is not complete until months or even years after submission of an application for access. Jarvis Dec. ¶¶ 4-5. While TWTC recognizes that projects may vary in scope and requirements, TWTC agrees with Fibertech that a 75-day timeframe for resolution of an application and completion of make-ready work is reasonable for a project covering at least 100 poles. Fibertech at 17. Furthermore, to the extent that delays are caused by utilities' failure to identify flaws in an prospective attacher's application, the Commission should consider in its rulemaking the adoption of a deadline, for example 48 hours from submission of an application, by which a utility must identify deficiencies in an attachment application.

Moreover, much of the delay experienced in obtaining pole access is due to utilities' refusal to permit the attacher's contractor (approved by the utility) to implement or engineer make-ready work. Where utilities insist that their own staff engineers schedule and implement make-ready work, the result is slower, more expensive make-ready work. Jarvis Dec. ¶ 9. At best, a pole owner may offer the attacher the option of paying the utility's engineers and outside plan personnel overtime in order to complete a project within a reasonable timeframe. This of course increases the cost of the project significantly. Jarvis Dec. ¶ 5. At worst, the attacher has no choice but to accede to the pole owner's schedule, risking the loss of a customer whose service depends on the

[2] *See* Comptel Comments at 9; segTEL Comments at 5-7; SigeCom Comments at 4; NextG Comments at 5-6; Sunesys Comments at 9-12; Indiana Fiber Works Comments at 3-4.

timely deployment of attachments.[3] If TWTC were permitted to hire its own utility-approved engineering contractor, TWTC could reduce make-ready costs substantially and ensure the consistency and reliability of its network across multiple deployments. Accordingly, as Fibertech proposed, pole owners should permit approved contractors to perform make-ready without pole owner supervision. Fibertech at 19. This is clearly a worthy subject for a rulemaking proceeding.

TWTC has also experienced substantial delays in accessing conduit. It can take from 120 to 180 days from the submission of a conduit access application to conclusively determine the existence and availability of conduit space.[4] As described by Fibertech, investigating the availability of conduit involves a two-step process. Fibertech at 8. The first step requires the pole owner to review its records to determine if the records show that a conduit exists along a particular route. The second step requires a physical inspection of the route to determine whether the conduit actually exists (*i.e.*, that the records are correct) and whether the necessary space is available. Moreover, utilities

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[3] Where a prospective attacher must rely on a pole owner's staff or affiliate to perform make-ready work for an attachment used to provide service in competition with the pole owner, the pole owner has an obvious incentive to raise its rival's costs. TWTC has encountered this problem most recently with power companies, like Idaho Power & Light ("IPL"), that have entered the telecommunications service market. IPL raises TWTC's costs by insisting that make-ready work for TWTC's attachments be performed by IPL's own affiliated engineers. This is a problem that will only become more acute as more power companies enter the telecommunications service business.

[4] While, under Section 224, attachers possess the right to access to all ILEC conduit, TWTC has encountered resistance from ILECs to permitting access to conduit near a manhole. Consequently, TWTC must install conduit and facilities between the manhole and the customer premises in order to access the ILEC conduit inside the customer premises. This practice creates unnecessary duplication of facilities between the street and the customer premises, entailing additional deployment costs as well as unnecessary inconvenience to the customer.

generally insist on using their own engineering staff to conduct the inspection, which creates yet another delay. *Id.* This is such a slow process that TWTC generally does not even seek access to utility-owned conduit. Thus, conduit access is another subject that the Commission should address in a rulemaking. In fact, the most appropriate means of addressing conduit access would be for the Commission to consider in its rulemaking requiring that utilities (1) check their records to determine the availability of conduit within a set time period, seven days would seem eminently reasonable, and (2) give attachers the right to use utility-approved contractors to perform a facilities-check to verify the existence of conduit and determine the availability of space in the conduit.

Finally, the Commission should address the inconsistent and often incorrect billing practices of pole owners. The Commission's rules require an attacher to pay a proportionate share of make-ready costs incurred by a preceding attacher if the subsequent attacher avails itself of pole capacity created by the preceding attacher's make-ready.[5] 47 C.F.R. § 1.1416(b). However, pole owners often do not comply with this requirement, and the attachers themselves lack the information and legal rights necessary to recover contributions from subsequent attachers. Jarvis Dec. ¶ 10. Pole owners are in the best position to monitor this process but have not done so without positive regulation. Pole owners have also failed to bill correctly for safety violation corrections, resulting in the newest attacher bearing the entire cost of correcting the safety

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[5] *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order, 11 FCC Rcd 15499 ¶ 1214 (1996) ("To protect the initiators of modifications from absorbing costs that should be shared by others, we will allow the modifying party or parties to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification.") ("*Local Competition Order*").

violations of previous attachers.[6] Jarvis Dec. ¶ 11. This practice is clearly contrary to existing Commission policy, as evidenced by the Commission's resolutions of past disputes.[7] The utilities' recalcitrance with regard to this requirement clearly indicates that adjudication alone does not suffice to produce adequate deterrence. Both of these billing issues, as well as the issues raised in the preceding paragraphs, should be addressed by specific federal rules.

II. Conclusion

For the reasons explained above, TWTC respectfully urges the Commission to grant Fibertech's Petition, and promptly issue a Notice of Proposed Rulemaking, in which it considers the practices proposed by Fibertech for reasonable and nondiscriminatory access to utility-controlled poles, ducts, and conduit.

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[6] *See also Local Competition Order* ¶ 1212 (1996) ("A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost. This will discourage parties from postponing necessary repairs in an effort to avoid the associated costs.")

[7] This practice is clearly contrary to existing Commission policy. *See Knology, Inc. v. Georgia Power Company*, Memorandum Opinion and Order, 18 FCC Rcd 24615 ¶ 37 (2003) ("[I]t is an unjust and unreasonable term and condition of attachment, in violation of section 224 of the Act, for a utility pole owner to hold an attacher responsible for costs arising from the correction of other attachers' safety violations."); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 ¶ 19 (1999) ("Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner's attachment to keep the pole within NESC standards should be borne by Time Warner.").

Respectfully submitted,

/s/

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March 1, 2006

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APPENDIX

Declaration of Jeff Jarvis on behalf of Time Warner Telecom Inc. (Jarvis Dec.)

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
Petition for Rulemaking of Fibertech Networks LLC	)	RM-11303

DECLARATION OF JEFF JARVIS

1. My name is Jeff Jarvis. I am the Regional Operations Director of Long Haul for Time Warner Telecom Inc. ("TWTC"). My business address is 520 SW 6th Avenue, Suite 300, Portland, Oregon.

2. As Regional Operations Director of TWTC's Longhaul Networks, I am responsible for network operations, systems engineering, network planning, and outside plant engineering and operation. I have been employed at TWTC for four and a half years. I have a Bachelor of Science Degree in Business Management (BSBM). I have 18 years of combined experience in the CLEC and cable industries. Prior to joining TWTC, I was employed by Enron Broadband Systems. In that capacity, my my main area of expertise was in Outside Plant Engineering and Construction as well as System Operations.

3. The purpose of my Declaration is to describe some of the unreasonable and discriminatory practices adopted by utility pole andc conduit owners, including power companies and incumbent local exchange carriers ("ILECs"), in the areas served by TWTC in the western United States. These practices constrain TWTC's ability to access poles, ducts, and conduits,

often unnecessarily inflating costs and negatively affecting TWTC's time and cost to deploy facilities needed to serve customers.

4. In my experience, the pole access application process and associated field surveys as well as make-ready work are often unnecessarily slow and costly. For example, in the territory where Sacramento Utility District ("SMUD") is the pole owner, an attacher can reasonably expect that its application will be processed, and the associated field survey, engineering review and review by the pole owner's Joint Use Administrator completed, within 30 days of submitting the application. Moreover, SMUD generally performs any make-ready work within 90 days after the approval of the application. SMUD meets these timeframes in significant part because it allows an attacher to work directly with other commnications grade attachers to complete the make-ready as soon as the application is approved.

5. Unfortunately, many utilities are nowhere near as efficient as SMUD. For example, Seattle City Light ("SCL") often approves applications within 30 days, but it does not schedule or perform make-ready work with the same expedience. Scheduling the make-ready alone can take months or even years. Sometimes, attachers can avoid such delays only by paying extra charges. In one case, TWTC submitted an application on May 15, 2005, and the application was approved on June 15, 2005. However, the SCL scheduler informed TWTC that the make-ready would not be completed until 2006. SCL told TWTC that it could complete the make-ready work before 2006 only if TWTC paid additional overtime charges. TWTC paid the extra amount (approximately $13,000 in addition to the $29,0000 initially requested for the make-ready work) and received the final permit to attach (with make-ready work completed) on September 7, 2005.

6. TWTC has also encountered unfounded resistance from some pole owners to the use of extension arms as a make-ready alternative to a pole replacement. Some of these pole owners

argue that extension arms create obstacles in the climbing space on poles. The pole owners assert that such climbing space is required for transmission line personnel to reach the top of the pole. However, most pole owners deploy bucket trucks in order to access pole attachments. In any event, extension arms are designed to meet standard safety requirements for climbing space and do not actually present obstacles. Where extension arms meet such requirements, the pole owners' reliance on safety concerns as the basis for refusing to use extension arms lacks credibility.

7. Moreover, TWTC has worked with utilities that do permit extension arms to the benefit of pole attachers and pole owners alike. For example, the Los Angeles Department of Water and Power ("LADWP") regularly adds ten-foot extension arms or alley arms, which are essentially longer and heavier extension arms, when vertical attachment space has been exhausted. The LADWP also permits use of so-called "F arms," which are 56-inch cross arms.

8. The addition of either type of arm creates several new attachment points for communications attachments. Moreover, the installation of an arm is relatively inexpensive. Extension arms cost approximately $300 plus rearrangement costs. In contrast, it costs between $4,500 to $10,000 plus rearrangement costs to replace a pole . Extension arms also provide additional benefits by reducing the "pull" or horizontal tension on the pole. When those loads are slight, installation of an extension arm offsets the stress, which eliminates the need to reduce the stress by placing an anchor and attaching a downguy, *i.e.* a strand, to the new attachment. Where extension arms are prohibited and guying the pole is impossible, the only alternative is to bury the cable. Buried cable plant construction costs are roughly ten times more expensive than aerial plant construction costs.

9. I have also experienced particular instances in which utility pole owners impose make-ready fees that far exceed the charges for comparable projects that other utilities charge for similar work. TWTC has experienced particular difficulties in this regard with Idaho Power and Light ("IPL"). In my experience, IPL engineers replace poles before ordering other attachers to rearrange their facilities, even when rearrangement of these attachments would suffice to provide the needed space. When IPL does order rearrangement of existing attachments, IPL insists on performing the make-ready work and will not allow attachers to employ contract engineers to perform their own make-ready work. In most cases, Idaho Power Solutions ("IPS"), a division of IPL, performs the make-ready work on IPL-owned poles. The IPL Joint Use Administrator has informed me that IPL rarely even considers rearranging existing communications attachments when assessing attachment grades, preferring instead to perform make-ready work on power lines. As Fibertech stated in its petition, make-ready work performed on power attachments is generally more expensive than make-ready work performed on other attachments. Accordingly, IPL's make-ready charges are often twice as high as make-ready costs for comparable projects performed by other utilities, such as Pacific Gas & Electric ("PG&E") or SMUD. Of course, if TWTC were permitted to hire its own IPL-approved engineering contractor, TWTC could reduce make-ready costs substantially. However, IPL has been unwilling to even discuss vetting contract engineers for their approval.

10. Additionally, it is my experience that pole owners fail to accurately bill for pole attachment services. Utilities have almost uniformly failed to establish a process to enable the recovery of costs from subsequent attachers who benefit from modifications initiated and paid for by TWTC. Although the pole owner is in the best position to identify any subsequent attachers, in my experience only one utility has assisted TWTC in identifying any subsequent

attachers. In that case, Washington Water & Power ("WWP") launched an experimental initiative which required that TWTC be notified if another entity applied for attachment to a pole that had increased in capacity due to make-ready work previously initiated and paid for by TWTC. Although WWP would provide notification, TWTC would still bear the burden of collecting a proportionate share of the incurred make-ready costs from the subsequent attacher. This is an extremely difficult process to administer, as the pole owner has the ultimate authority to collect these fees. I am aware of instances in which new attachers have benefited from increased capacity made possible by modifications initiated by TWTC. However, because TWTC, as an attacher, lacks the requisite monitoring and administration resources and legal rights of a pole owner, it has been unable to recover a proportionate share of the cost of the modifications.

11. Additionally, in some cases in Washington and Idaho, the pole owner charges a new attacher for fixing the safety violations of pre-existing attachments. For example, a cable company may have strung its strand too tightly to follow the sag of the other attachments on the pole creating a mid-span violation. Fixing this safety violation may be required in order to create the necessary capacity for the new attacher, *e.g.*, the over-taut line may necessitate a pole replacement to create space at the mid-span. Rather than charge the cable company in this example for fixing this problem, WWP charges the new attacher. In contrast, it is common practice in the SMUD and PG&E regions of California to require the attacher to fix its own safety violation so that a new attachment can be installed.

12. Finally, in my experience, access to conduit is also neither timely nor reasonable. This problem is so acute that TWTC rarely requests utilites for access to conduit space. The process is simply too time-consuming and costly to allow TWTC to respond to customer requests to

deploy transmission facilities. Generally, in rare cases where TWTC does request access to records in order to determine whether a conduit has been deployed along a particular route, pole owners charge a fee that TWTC must pay upfront regardless of whether the pole owner actually locates a conduit. The records search alone may take up to 30 days. Even if a viable conduit is found in the records search, TWTC must then pay the pole owner to visually inspect the conduit to verify that the space in the conduit is actually available. Scheduling and conducting the inspection causes the greatest delay, because the pole owner's staff must find the resources and time to conduct the inspection in addition to their regular responsibilities. The entire process is neither transparent nor timely. Indeed, it generally takes between 120 to 180 days to complete the process of applying for and obtaining access to pull fiber through a conduit.

13. This concludes my Declaration.

14. *Pursuant to 47 C.F.R. § 1.16, I declare under penalty of perjury that the foregoing is true and correct. Executed on: March 1, 2006.*

3/01/06

Jeff Jarvis